

TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy
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Then Some [Stupid](#) with a Bad Environmental Law Burned the Place to the Ground

According to the Federal government's [top expert](#) lots of things can cause wild fires including lightning, [campfires](#), [matches](#), [cigarette butts](#), [gun fire](#), [locomotives](#), arson, etc.—especially when helped out by drought. Noticeably missing from Smokey's list of fire causes is "bad environmental laws", an omission remedied by President Trump this week who [tweeted](#) that fires in California are "being magnified & made so much worse by the bad environmental laws which aren't allowing massive amount (sic) of readily available water to be properly utilized. It is being diverted into the Pacific Ocean". Just what those laws are, what water is not being properly used—or how it could help with the fires, and why rivers reaching the ocean is somehow a diversion is not explained. Nor is it apparent to us. At all. It seems like just yesterday when it was just [some stupid with a flare gun who burned the place to the ground](#) and it was only [Deep Purple](#) not Deep State making news.

To Market To Market

If we accept, even just for the sake of argument, that California actually does have a shortage of water and not just bad environmental laws, is there really anything you can do to better match water availability and conservation? Very good question and not an easy one. For surface water, which is burdened by a complex and time honored mix of prior appropriation, riparian and pueblo rights laws, options and flexibility are hard to come by—as is water itself. So much of action has to come from groundwater that has been more of a free-for-all and is just now getting real legal attention, [attention that could lead to big changes in land use](#), like the fallowing of farm land. If fallowing is necessary then maybe that necessity can be the mother of invention. Cue, Edgar Terry whose farm depends on the overdrafted Oxnard Aquifer. [His idea, spur conservation and productivity by creating a water trading market that is based on giving current water users an allocable \(and tradeable\) share of a yet to be set cap \(called a sustainable yield\) of pumpable water.](#) Let's be clear that this more of a controlled market for water rights than for water itself (a distinction that our next story makes clear). Getting everyone on board will be no slam dunk, but the idea will be trotted out as a pilot later this month and as garnered real interest from The Nature Conservancy and Environmental Defense Fund.

Speculation Frustration

[You say you want a \(water\) revolution, well we'd all love to see the plan.](#) [Thanks](#), Edgar Terry (see above) for showing us yours, but for

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The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and stewardship of water.

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Tulane Institute
on **Water Resources Law & Policy**

6325 Freret Street, 1st Floor

New Orleans, LA 70118

504-865-5982

tulanewater.org

TWITTER: [@TulaneWaterLaw](https://twitter.com/TulaneWaterLaw)

some folks a namby-pamby conservation oriented approach to water marketing just won't cut it. For them, water marketing means just that, selling water to whomever wants it at whatever price it commands. Folks like those at Augustin Plains Ranch LLC (APR) whose [unspecified uses just got nixed by the New Mexico State Engineer on the grounds that the use was too speculative to support an appropriation](#). Under New Mexico law (and most other states in one way or another) water rights are granted for specific reasonable purposes and there is policy against letting people speculate with water. Even though APR said it planned provide water to several named communities, none of them had any agreement with APR. Despite the "striking absence of information" (the State Engineer's words) about end uses, we feel certain that APR and others won't be daunted from appealing or reapplying. Apparently this was their third rejection.

Hey States, Be One of the Cool States...

And get in on the [fun of regulating dredge and fill activity](#) under [Section 404 of the Clean Water Act](#). Normally, the Army Corps of Engineers covers this base, but thanks to [Section 404\(g\)](#) of the CWA states—and tribes—have long had the authority to get in on the regulating excitement. For some reason, only two states have ever taken this plunge, but maybe that's because the others never really felt they would be welcome. "Perish the thought!" says the Army Corp in a [memorandum released July 30](#). Go ahead, sign up. Please. Sure, it won't be exactly clear what waters a state or tribe will get authority over or where the money and talent to run the show will come from, but that can all be worked out. After all, just think how popular the 404 program has made the Corps. The [rationale](#) behind this push is tied to the White House's conviction that infrastructure projects will be handled better and quicker at the state or tribal level if they are delegated pieces of the 404 program. To be determined if they can convince states and tribes to have the courage to act on the Trump administration's convictions.